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APPENDIX A

IN THE SUPREME COURT OF MISSOURI

Consolidated Case Nos. 73867, 74139

NICOLE ADAMS, By and Through Her Legal Guardian and Next Friend, JULIA ALICE ADAMS, and JULIA ALICE ADAMS, Individually,

Appellants,

v.

THE CHILDREN'S MERCY HOSPITAL, SUZANNA ROUSHAR, R.N., CYNTHIA DOOLEY, R.N., and JANE JELINEK-BOOZALIS, M.D.,

Respondents.

Appeal from the Circuit Court of
Jackson County, Missouri, Division 6

THE HONORABLE JOHN R. O'MALLEY,
Circuit Court Judge

APPELLANTS' BRIEF

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ARGUMENT

I. THE TRIAL COURT ERRED BY GIVING EFFECT TO CHAPTER 538 OF THE MISSOURI REVISED STATUTES IN ITS JUDGMENT ENTRY OF MARCH 14, 1991 BECAUSE (A) PLAINTIFFS ARE SEVERELY AND IRREPARABLY HARMED BY THE TRIAL COURT'S APPLICATION OF (1) SEC. 538.210 LIMITING NON-ECONOMIC DAMAGES TO $430,000.00 PER SEPARATELY INSURED DEFENDANT, (2) SEC. 538.230.1 PERMITTING MALPRACTICE DEFENDANTS TO APPORTION FAULT TO RELEASED PARTIES, (3) SEC. 538.230.2 MODIFYING JOINT AND SEVERAL LIABILITY, (4) SEC. 538.220 PERMITTING PAYMENT OF FUTURE DAMAGES IN PERIODIC OR INSTALLMENTS, AND (5) SEC. 538.300 BARRING APPLICATION OF THE PRE-JUDGMENT INTEREST RULE, SEC. 408.040, TO MEDICAL MALPRACTICE DEFENDANTS AND (B) THESE PROVISIONS OF CHAPTER 538 VIOLATE SPECIFIC GUARANTEES OF THE MISSOURI CONSTITUTION OF 1945 WHICH ARE (1) THE OPEN COURTS AND CERTAIN REMEDY WITHOUT DELAY PROVISION, ART. I, SEC. 14, (2) THE RIGHT OF TRIAL BY JURY, ART. I, SEC. 22(A), (3) EQUAL RIGHTS AND OPPORTUNITIES, ART. I, SEC. 2, (4) DUE PROCESS OF LAW, ART. I, SEC. 10, (5) THE SPECIAL LAW PROVISION, ART. III, SEC. 40(28), (6) THE SPECIAL PRIVILEGES OR IMMUNITIES CLAUSE, ART. I, SEC. 13, (7) THE ONE SUBJECT REQUIREMENT, ART. III, SEC. 23, AND (8) THE SEPARATION OF POWERS, ART. II, SEC. 1

Now before this Court is an action involving every parent's worst nightmare: a normal, healthy, happy

child enters the hospital for a minor procedure and leaves severely crippled and multiply handicapped—in this instance, blinded, severely brain damaged, and neurologically impaired. A lawfully constituted jury under the watchful eye of a careful trial judge determined that fair and just compensation to this child for the harm inflicted upon her was $19,750,732.00.

This Court needs to decide whether Nicole Adams and future malpractice victims are to retain the benefits of the common law approach to justice, a decision of tremendous importance and significance to Missouri citizens. The question presented is whether various provisions of the Missouri Medical Malpractice Statute of 1986 are constitutional under the Missouri and United States Constitutions. By authority, reason, and in the interests of justice, Appellants herein respectfully urge this Honorable Court to strike down these unjust laws and to reaffirm this Court's historical and constitutional role as the guardian of individual rights and liberties in our free society.

* * * *

3. The Provisions of Chapter 538 Violate the Missouri Constitutional Guarantee of Equal Rights and Opportunities Under the Law

Section 2 of Article I of the Missouri Constitution, which is the Bill of Rights, provides as follows:

> That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; *that all persons are created equal and are entitled to equal rights and opportunities under the law;* that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

Missouri Constitution of 1945, Article I, Section 1 (Emphasis added). The challenged provisions of Chapter 538 violate the Equal Rights and Opportunities provision of Article I, Section 2, because these provisions impose discriminatory treatment on one particular class of tort victims, those unfortunate enough to be injured by negligent medical practitioners. Moreover, Section 538.210, the "capping" provision, creates a discriminatory sub-class of persons within the class of medical malpractice victims, whose non-economic damages are fairly and reasonably found by a jury to be in excess of the statutory "cap." By reason of this dramatic and arbitrary difference in the quality of justice which victims of medical malpractice may receive compared with victims of any other actionable negligence, Nicole Adams respectfully submits that the challenged provisions deny her equal rights under the law in violation of the constitutional guarantees set forth in Article I, Section 2.

In considering an equal protection challenge to a statute, the Court "may consider both the information before the legislature when it adopted the statute and information currently available." *Collins v. Director of Revenue*, 691 S.W.2d 246, 250 (Mo.banc. 1985); *see also State v. McManus*, 718 S.W.2d 130, 131 (Mo.banc. 1986); *Leary v. United States*, 395 U.S. 6 (1969).

A review of the materials available to the legislature at the time of the alleged medical malpractice "crisis" and based on data and other studies generated in the intervening five (5) years clearly establishes that there was no legitimate basis for the legislature's separate classification of medical malpractice victims regardless of the particular Equal Protection test utilized.

A. Analysis of the "Presumptive" Objectives of Chapter 538 In Relation to a "Medical Malpractice Crisis"

The Missouri Medical Malpractice Act was the result of a compromise negotiated between the Missouri Associa-

tion of Trial Attorneys and a coalition of health care providers.[17] Neither Senate Bill No. 663, nor the statutory language itself, gives any explicit objectives, goals, or interests to which the legislation was directed. *See* S.B. 663 (Legal File 107.32). Accordingly, one may only put forth a list of "presumptive" goals of the legislation given the context of the public discussion during 1985-86 and by sampling the explicit legislative purposes set forth in similar statutory schemes enacted by other states.

These legislative objectives include reduction or elimination of frivolous malpractice claims, assuring availability of health care, decreasing the expense and complexity of malpractice litigation, reducing re-insurance costs for malpractice liability carriers, and lowering malpractice insurance premiums for physicians, hospitals and other health care providers.

It becomes difficult to assess the legitimacy of the legislature's objective in enacting a statute when neither the bill nor the legislation as passed contains any mention of its purposes. However, even if given the benefit of the aforementioned "presumptive" goals, information available from the mid-1980's and data accumulated since then establish no rational basis for the harsh statutory treatment of medical malpractice victims in comparison to other tort victims under any level of constitutional scrutiny.

The number of newly licensed physicians over the past decade has seen a fifty-five percent (55%) increase on a yearly basis since 1980. State Board of Registration for the Healing Arts, Information Summary, October 7, 1991. The current number of licensed physicians in Missouri

[17] *See* Terry, "*Missouri's Malpractice Concord*," 51 Mo.L.Rev. 463-66 (1986). The health care coalition was made up of the Missouri Hospital Association, the Missouri Medical Association, and the Missouri Association of Osteopathic Physicians and Surgeons. *Id.* at 463; Transcript of Joint Meeting of Trial Attorneys and Various Health Care Providers, November 27, 1985 (Legal File, p. 107.40).

is 11,458 and almost fifteen percent (15%) of those were newly licensed in 1990. The number of physician licenses issued each year in the State of Missouri has increased steadily from 1,103 in 1980 to 1,302 in 1985 to a total of 1,706 in 1990. *Id.* Contrary to any conceivable shortage of physicians, the argument may be made that we are approaching a physician glut.[18] Kirchner, *Whatever Happened to the Great Doctor Glut?*, Medical Economics (June 5, 1989), at p. 138.

As a reflection of the overall population of Missouri, the number of medical malpractice claims has remained remarkably level. In 1981, the total number of medical malpractice claims throughout the entire state was 832. Medical Malpractice In Missouri, 1983, Statistical Section, Missouri Division of Insurance, p. 1. While the number of claims rose to 1,301 in 1982, the level dropped back down to 1,118 in 1983 *Id.*

With respect to any "crisis" of runaway jūries or "excessive" awards, the statistical information from our own State does not bear this out. For the three (3) years 1984-1986 inclusive, the *total* number of claims paid which exceeded $1,000,000.00 was 13 Medical Malpractice in Missouri, 1984-86, Statistical Section, Missouri Division of Insurance (January 1988), pp. 1-2. For all of the years 1984-86, the number of claims paid in an amount over $100,000.00 were 70, 113, and 136, respectively. *Id.*

Furthermore, the percentage of malpractice claims closed without any payment whatsoever remained very stable between 1984 and 1986, ranging from 63.8% to 67.5%. In other words, in only 32-36% of all malpractice claims made was any payment issued. *Id.* The number of

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[18] Nationwide, despite steady increases in malpractice insurance costs from 1975 to 1988, the number of physicians in the U.S. increased from 409,000 to 546,000, causing concern about an oversupply of doctors. Kirchner, *supra*, at p. 140.

paid claims in 1985 and 1986 were 609 and 606, respectively. *Id.* at p. II.

The number of medical malpractice claims which were closed with some payment continued an expected rise with increase in population in 1987 and 1988 with a reported 633 and 684, respectively. Medical Malpractice in Missouri, 1986-88, Statistical Section, Missouri Division of Insurance (October 1989), p. 1. The percentage of malpractice claims closed without payment remained stable over the 3-year period, 67.3% for 1986, 67.4% for 1987, and 63.8% for 1988. *Id.* The number of paid claims over $100,000.00 continued to be a small percentage of total paid claims and an exceedingly small percentage of total claims. In 1986, there were only 144 such paid claims, down to 105 in 1987, and then to 142 in 1988. *Id.* Appellants are unaware of any Missouri data revealing the number of incidents of injury-producing malpractice for which no claim was ever made. One well-documented study concluded that the vast majority of provable medical malpractice claims are simply never brought.[19]

For the most recent period of time for which information is available, the Missouri Division of Insurance reports a substantial decline in the percentages of jury outcomes in favor of the plaintiff. Missouri Medical Malpractice Insurance Report, 1988-89, Missouri Department of Insurance, September 1991, p. 2. In 1983, 50.6% of the outcomes were in favor of the plaintiff, where in 1990 that figure had dropped to 35.3%. These statistics continue to refute any epidemic of "runaway juries." In

[19] A recent study of New York hospitals conducted by the Harvard School of Public Health concluded that an enormous percentage of meritorious malpractice claims are never brought by the victim or the victim's family. Harvard Medical Practice Study, "*Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York,*" (February 1990) (Legal File, p. 107.292) ("eight times as many patients suffered an injury from negligence as filed a malpractice claim in New York State"). *Id.* at 6.

fact the opposite is true: the number of paid claims in excess of $1,000,000.00 was 4 in 1988, 2 in 1989, and 4 in 1990. *Id.* at 8-12. This hardly smacks of a "crisis."

Given the steady increase in the number of licensed physicians in Missouri each year since 1980 and the claims experience as documented by the Missouri Department of Insurance, there appears little objective documented data in support of a true "crisis." That much of the hysteria was created by malpractice insurance carriers, rather than the providers themselves, is clear in hindsight. *Missouri's Malpractice Concord*, *supra*, at 463 & 463 n. 44-47.[20]

The Missouri experience closely tracks that of other states across the country. A survey of the General Accounting Office concluded that of 73,472 malpractice claims closed in 1984, only 759 (approximately one percent) received in excess of $100,000.00 for non-economic damages. General Accounting Office, *Medical Malpractice: Characteristics of Claims Closed in 1984*, 49 (1987).

Studies which look at the relationship between "capping" damages and insurance savings have found that the savings from tort reform range from "marginal to non-existent." Claim Evaluation Impact, National Overview 4 (ISO, 1987). The study concluded that caps on non-economic damages resulted in no savings whatsoever in most situations. *Id.* at 75.

Two of the largest medical malpractice carriers conducted a study which concluded that a $250,000.00 cap on non-economic damages would be applicable to so small a number of cases that it would result in no significant savings. *Reprinted in* National Insurance Consumers Organization, *The Florida Experience* (1987). Indeed, according to St. Paul Fire & Marine Insurance Company, "nowhere has it been proved that tort reform will affect

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[20] *See also* authorities cited at note 25 and pages 74-75, *infra*.

our loss costs." *Why Tort Reform Doesn't Reduce Malpractice Premiums*, Medical Economics (October 19, 1987), at 28; *see also* Study, General Accounting Office, *Medical Malpractice: Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reforms*, "*Case Study on California*" 12, 22 (Dec. 1986).

The median income of Midwest doctors in 1988 was $241,070.00. Owens, Earnings Survey, Medical Economics, September 4, 1989, at 141. The median malpractice premium for physicians in the Midwest in 1988 was $11,330.00.[21] Paxton, *Just How Heavy is the Burden of Malpractice Premiums?*, Medical Economics, Jan. 16, 1989, at 182. Professional liability insurance is simply a cost of doing business.[22] To suggest that physicians would leave the practice of medicine at even two to three times that amount of premium, and willingly sacrifice such a handsome income attained after many years of education, is simply unreasonable per se. These studies and statistics firmly belie the existence of any "crisis" in health care in the State of Missouri.

B. Strict Scrutiny Analysis Is Applicable Where the Statute Affects "Fundamental Rights" Or a "Suspect Class"

This Court repeatedly has stated that the "first step in addressing [an] equal protection claim" is to deter-

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[21] Not surprisingly, the specialties with the highest earnings paid the highest insurance premium. In 1988, the *median* gross salary for a cardiovascular surgeon was $529,170.00, with a net after expenses of $372,500.00. Owens, *supra*, at 147. The median insurance premium in that specialty in 1988 was $32,120.00. Paxton, *supra*, at 172. The median insurance premium for *all* surgical specialties was a mere 7.4% of gross income. Paxton, *supra*, at 168.

[22] A GAO Study concluded that malpractice insurance premiums make up one of the smallest categories of physician expenses. General Accounting Office, *Medical Malpractice: Insurance Costs Increased But Varies Among Physicians and Hospitals* (September 1986), at 2-3. It ranked far below payroll, medical supplies, and general office expenses, comprising only nine percent (9%) of total professional expenses. *Id.* at 3.

mine whether the challenged legislation impinges upon, impairs, or touches a "fundamental right" or operates to the disadvantage of a "suspect class." *State Board of Registration v. Giffen*, 651 S.W.2d 475, 471 (Mo.Banc 1983); *see also Belton v. Board of Police Commissioners*, 708 S.W.2d 131, 139 (Mo.banc. 1986); *State v. Bolder*, 635 S.W.2d 673, 682 (Mo.banc. 1982), *cert. denied*, 459 U.S. 1137 (1983); *Labor's Educational and Political Club-Independent v. Danforth*, 561 S.W.2d 339, 347 (Mo. banc. 1978) (citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 [1976]). "The presumption of constitutional validity vanishes" when the legislation impinges upon a "fundamental right." *Mahoney v. Doerhoff Surgical Services, Inc.*, *supra*, at 512.

The challenged provisions of Chapter 538 squarely affect appellants' constitutionally guaranteed rights of trial by jury and to open courts and a certain remedy. These rights have been held by Missouri courts to be "fundamental." *Scott v. Young*, *supra*, (jury trial); *Lohse Patent Door Co. v. Fuelle*, *supra* (certain remedy).

The test for triggering the "strict scrutiny" analysis is not total abolition of a "fundamental right" but simply whether that fundamental right is in any way infringed upon or impaired. *Labor's Educational and Political Club-Independent v. Danforth*, *supra*, at 348. The "fundamental right" itself need not even be directly impacted on. There need only be an "indirect impact" on a fundamental right in order to trigger a strict scrutiny analysis. *Id.* According to the U.S. Supreme Court, strict scrutiny is triggered if the statute at issue merely comes in conflict with a fundamental right:

> [T]he Court has applied strict scrutiny to state or federal legislation *touching upon constitutionally protected rights*. Each of our prior cases involved legislation which "deprived" "infringed" or "interfered" with the free exercise of such *fundamental personal right or liberty*.

San Antonio Independent School District v. Rodriguez, 411 U. S. 1, 38-39 (1973) (Emphasis added).

In *Labor's Educational and Political Club-Independent v. Danforth*, *supra*, the Missouri Supreme Court was called upon to review the constitutionality of the Campaign Finance and Disclosure Act which contained a provision forbidding any candidate who had violated the act from becoming a candidate for ten (10) years following such violation. *Id.* at 342-43.

In deciding whether to apply the strict scrutiny or rational relationship test, the Court noted that while the right of a person to seek public office is not necessarily a "fundamental right," the right to vote most assuredly is. *Id.* at 348. The Court recognized that "a limitation on the right to be a candidate has at least an *indirect impact* on one of the most basic fundamental rights—the right to vote." *Id.* at 348 (citing *Williams v. Rhodes*, 393 U.S. 23, 31 [1968]) (Emphasis added).

Thus, in view of the fact that the act "has a real and appreciable impact on the right to vote," the Court held that a strict scrutiny analysis was required. *Id.* Under that analysis, the Court found that the classification scheme was "arbitrary and unreasonable and does not further the purpose of the act" and held it to unconstitutionally violate Article I, Section 2, the Equal Rights and Opportunities Provision of the Missouri Constitution. *Id.*

Chapter 538 also creates a "suspect class" of persons injured by the acts of health care providers and imposes upon them burdens and conditions affecting their fundamental rights which are not imposed upon other members of the larger class of injured persons in general. In that a "suspect class" exists, strict judicial scrutiny of the offending statute is required by the Missouri Constitution. *State Board of Registration for the Healing Arts v. Giffen*, *supra*, at 479; *State v. Bolder*, *supra*, at 682.

Future medical malpractice victims constitute a "suspect class" deserving of strict scrutiny equal protection,

in view of their physical disabilities, political powerlessness, and functional dissimilarity from other tort victims. In defining a suspect class, the United States Supreme Court has stated that any classification should be treated as suspect where the "class is . . . saddled with such disabilities, . . . or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian and political process." *San Antonio Independent School District v. Rodriguez, supra*, at 33-34.

By definition, medical malpractice victims have extraordinary disabilities and in that this legislation harms those who are most severely injured, that class of person qualifies as a "suspect class" deserving of strict scrutiny protection. Furthermore, it is difficult to imagine a group of more "political powerlessness" than nameless, presently unidentifiable victims of severe medical negligence. For these additional reasons, strict scrutiny analysis is appropriate.

A strict scrutiny analysis requires the proponent of the legislation to show that the legislature has a "compelling" state interest in the classification scheme selected. *Labor's Educational and Political Club-Independent v. Danforth, supra*, at 348-49. It places a "very heavy burden of justification" on the proponent of the legislation to prove that it is "necessary to promote a compelling state interest." *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

Courts have applied a strict scrutiny analysis in invalidating their state's "capping" legislation treating certain injury victims differently from other victims of torts. *Simon v. St. Elizabeth Medical Center, supra*, at 911-12; *Graley v. Satayathem*, 343 N.E.2d 823, 838-39 (Ohio C.P. 1976); *Pfost v. State of Montana, supra*, at 501-02.

Strict scrutiny equal protection analysis was invoked by the Ohio court in *Graley v. Satayathem, supra*, as follows:

> There obviously is "no compelling governmental interest" unless it be argued that any segment of the

> public in financial distress be at least partly relieved of financial accountability for its negligence.

Id. at 837. In view of the nature of the rights at stake in this controversy, strict scrutiny of the Missouri medical malpractice legislation is called for.

C. Application of an "Intermediate" or "Heightened" Level of Scrutiny to Chapter 538 is Warranted Given the Nature of Rights Impaired

In view of Chapter 538's substantial erosion of the constitutional protections afforded this one particular class of tort victims, Appellants respectfully urge this Court to apply, at minimum, an enhanced or "heightened scrutiny" of the societal justifications for the legislation. Even if the right to pursue fair compensation for bodily injury were not deemed "fundamental" by this Court so as to trigger a "strict scrutiny" analysis, the constellation of rights involved merits greater constitutional protection than that afforded by the "rational basis" test. This "intermediate" level of scrutiny as applied to this legislation recognizes that a prime function of our social order is to protect the health and well-being of individual citizens and to provide just compensation to human beings who have suffered ruinous physical injury due to the fault of others.

Many of the courts striking down similar medical malpractice legislation on equal protection grounds have applied the "intermediate" or "heightened level of scrutiny" to the various legislatures' handling of the purported malpractice "crisis." *Jones v. State Board of Medicine*, 555 P.2d 399 (Idaho 1976), *cert. denied*, 431 U.S. 914 (1977); *Carson v. Maurer*, *supra*, at 830; *Brannigan v. Usitalo*, *supra*, at 1234; *Sibley v. Board of Supervisors of Louisiana State University*, 477 So.2d 1094 (La. 1985); *Arneson v. Olson*, *supra*, at 133-34; *Hanson v. Williams County*, 389 N.W.2d 319 (N.D. 1986).

The U.S. Supreme Court has applied a "heightened" level of scrutiny where statutes applied either to "quasi-fundamental rights" or "semi-suspect" classes. *Lalli v. Lalli*, 439 U.S. 259, 269 (1978); *Craig v. Boren*, 429 U.S. 190, 240 (1976), *rehearing denied*, 429 U.S. 1124 (1977); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). Under this heightened level of scrutiny, the Court looks to whether a "substantial relationship" exists between the means and ends of the statutory classification scheme. *Id.* Rather than a "rational relationship" to the legislative purpose, the proponent must demonstrate that the classification created by the challenged statute is "reasonable, not arbitrary, and must rest upon some ground of difference having a *fair and substantial relation to the object of the legislation*" for the statute to satisfy state Equal Protection. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (Emphasis added). Accordingly, this "heightened" level of judicial scrutiny calls for the court to independently examine the basis for the statutorily-created classification scheme. *Arneson v. Olson*, *supra*, at 133; *Carson v. Maurer*, *supra*, at 831.

The Supreme Court of Missouri has recognized that the infringement of a fundamental right or discrimination on the basis of a quasi-suspect classification would warrant "heightened" or "intermediate level" scrutiny Equal Protection analysis, rather than the "rational basis" test. *State v. Walsh*, 713 S.W.2d 508, 510 (Mo.banc. 1986); *see also State of Missouri v. Taylor*, 726 S.W.2d 335, 336 (Mo.banc. 1987).

In noting that the right to recover for personal injuries was "an important substantive right," the Supreme Court of New Hampshire applied the "fair and *substantial* relationship" test in invalidating the medical malpractice statute under review:

> We now conclude, however, that the rights involved herein are sufficiently important to require that the restrictions imposed on those rights be subjected to

> a more rigorous judicial scrutiny than allowed under the rational basis test.

Carson v. Maurer, supra, at 830 (Emphasis added).

Assuming, arguendo, that malpractice insurance rates were temporarily high or that physicians were relocating because of high medical malpractice insurance premiums, that in and of itself is no constitutionally permissible objective to trample upon cherished rights. Notwithstanding the extreme cycles of the casualty insurance industry, all businesses and professions have down cycles but, as one court concluded, that does not provide a legitimate basis for legislation which props up the favored class to the great detriment of the disfavored class:

> To articulate the requirement is to demonstrate its absurdity, for at one time or another, every type of professional business undergoes difficult times, and *it is not the business of government to manipulate the law so as to provide succor to one class, the medical profession, by depriving another, the malpracticed patients, of the equal protection mandated by the Constitution.*

Graley v. Satayathem, supra, at 837 (Emphasis added).

As stated by the Supreme Court of New Hampshire in finding its state's medical malpractice statute violative of equal protection under a "more rigorous" judicial scrutiny:

> It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation.

Carson v. Maurer, supra, at 837.

In analyzing whether the challenged sections of Chapter 538 have a *substantial* relationship to the "presumptive" objective of lowered insurance costs, one must lose

sight of the principal societal function of insurance. Insurance spreads the risks of harm among many in order to prevent an unfortunate few from suffering dire personal financial hardship. The challenged legislation renders this principle topsy-turvy by favoring the most culpable insurance premium payers over those upon whose behalf the insurance exists.

Some courts have questioned why the legislature did not explore other avenues to accomplish its purpose which would not have infringed so deeply upon the constitutional rights of injured persons. *Waggoner v. Gibson*, 647 F. Supp. 1102, 1104-05 (N.D.Tex. 1988) (no explanation "why the only legislative response to the insurance 'crisis' is to limit the recoveries of malpractice claimants with the most meritorious and substantial suits, and is silent as to other conceivable avenues of investigation."); *Detar Hospital, Inc. v. Estrada, supra*, at 366 (other causal factors may be behind the "malpractice insurance crisis"). In seeking to accomplish the presumptive goals of Chapter 538, the Missouri legislature could have utilized other means which would not have the deleterious effect of trampling upon persons already maimed and crippled by malpractice.

A far more equitable means of addressing any medical malpractice concerns would be to single out and address those physicians and other providers who repeatedly are found liable for malpracticing upon their patients. Increasing the medical training for such physicians or imposing the burden of higher malpractice insurance costs more directly on repeat offenders or spread throughout the general public would be far more equitable than placing the entire burden on the innocent victims.

The expressed legislative purposes of the North Dakota Medical Malpractice Act were similar to the presumptive purposes of the Missouri legislation: to assure the availability of medical and hospital services, to eliminate the expenses incurred relating to the filing of non-meritorious

medical claims, and encouraging competent physicians to remain in practice. *Arneson v. Olson*, *supra*, at 135. Applying a "more rigorous scrutiny" to whether the "caps" provision related to these goals, the Court concluded as follows:

> *Does the limitation of recovery of seriously damaged or injured victims of medical negligence promote these aims? We hold that it does not and that it violates the Equal Protection Clause of the State Constitution.*

Id. at 135 (Emphasis added). For precisely these same reasons, Section 538.210 should be invalidated as none of the "presumptive" goals of the Missouri legislation even remotely warrants the penalties meted out to persons like Nicole Adams.

D. Under the "Rational Relationship" Test No Legitimate State Interest is Served by Legislative Discrimination Against Medical Malpractice Victims

The "rational relationship" test requires the Court to assess whether any legitimate state interest is promoted by the classification scheme created by the statute. *State v. Brown*, 599 S.W.2d 498, 504 (Mo.banc. 1980), *cert. denied*, 449 U.S. 985 (1980); *see also Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 173 (1972). When this statutory scheme is carefully reviewed in terms of the objectives sought, it becomes clear that singling out the class of persons most catastrophically injured and disabled by health care providers for disparate treatment has no reasonable or legitimate relationship to the presumed state interest of reducing malpractice insurance costs or increasing the availability of health care.

The overwhelming body of data to the effect that the bases for Chapter 538 were substantially flawed and short-lived should serve to overcome any presumption of the statute's constitutionality. As a result, this Court

should set aside any tendency to customarily defer to the legislative judgment in this instance and conduct a careful Equal Protection scrutiny of the legislation's constitutionality as is befitting of this Court's critical role in our government.

Applying the rational relationship test, a number of other courts have determined that a legislative act which "caps" damages is an unconstitutional denial of equal protection. *Waggoner v. Gibson, supra; Wright v. Central DuPage Hospital Association, supra; Arneson v. Olson, supra; Carson v. Maurer, supra; Morris v. Savoy, supra.*

The fact that physicians and hospitals would have to pay higher premiums for liability coverage is *not* a legitimate basis to deny the full measure of compensation to the persons they injure. The interest of the state in protecting the income of physicians is not a legitimate goal when to do so results in a measure which is not shared equally among consumers of health care, but to be born entirely by those consumers who receive *bad* health care. Fearing a "crisis," the legislature has been induced to drastically diminish doctors' and hospitals' accountability for their negligence.

In that one of the historic functions of the tort system is to provide incentives for careful actions, in addition to compensating the injured, the logical and unavoidable result of Chapter 538 is to *lower* the standard of practice of medicine in Missouri because of the limited liability provisions. On this precise point, the Supreme Court of Wyoming observed that:

> If the medical professional is less accountable than formerly because of the special treatment afforded . . . then a relaxation of medical standards may occur with the public as the victim. To find that the protection and special dispensation given to health care delivery tortfeasors . . . is in the best interest of public health is illogical to the point of irrationality.

Hoem v. State, 756 P.2d 780, 783-84 (Wyo. 1988) (citing to *Boucher v. Sayeed*, 459 A.2d 87, 94 [R.I. 1983]).

A "presumptive" objective of the Missouri legislation was to reduce the cost of litigation because of the filing of nonmeritorious medical malpractice claims. That objective is not even remotely applicable to the case at bar. In Dr. John Ryan from Harvard and Dr. Phillip Larson from Stanford. Appellants brought to trial two (2) of the most respected anesthesiologists in the country, both of whom testified that clear malpractice was committed.

Furthermore, it is difficult to make any sensible argument that that objective is addressed by the challenged provisions of the legislation. To this specific issue, in the process of concluding that the "rational relationship" test was failed, it was stated:

> The assumption, which has not necessarily been tested, is that unjust claims are being prosecuted successfully, and this assumption may be a fallacy.

Hoem v. State of Wyoming, *supra*, at 788 (Thomas, J. concurring.) In fact, given the extraordinary real and potential effect of this Act on horribly injured malpractice victims, it is difficult to contrive *any* legislative objective which would fairly justify further burdens on this already severely burdened class. This class of individuals by definition already has been disabled and impaired and should not be placed on the scrap heap of society in favor of the enhanced social welfare of doctors and their insurers.

Applying the "cap" only to non-economic injury does not save the provision from Equal Protection attack. As is clear by the statutory definition of "economic damages" which include both medical expenses and lost income, this is merely compensation for products and services specifically needed because of the injuries and to replace income lost because of the inability to work due to these injuries. Economic loss alone does not and cannot fully compensate

an injured person. When one has suffered an injury which will produce life-long quadriplegia, blindness, severe mental retardation, or loss of limb, it is the function of non-economic damages to compensate a human being for that loss in society's best effort to make that person whole.[23]

In view of the proof of Nicole Adams' injuries at trial, no court in America would hold that her compensatory, non-economic damages should be remitted to $430,000.00 or $860,000.00. If Nicole Adams had sustained precisely the same injuries in a motor vehicle accident, by an exploding tire rim, or by any other actionable negligence, she would have the benefit of the jury's finding of full and and fair compensatory damages. That she should be caused to suffer more because she was injured at the hands of a physician is so arbitrary as to defy common sense.

As originally enacted, Section 538.300 provided that *both* pre- and post-judgment interest provided by Section 408.040 would be verboten for medical malpractice plaintiffs. In amending the law two (2) years later solely to permit malpractice victims' to recover *post*-judgment interest, the Missouri legislature plainly recognized that the removal of post-judgment interest for this one class of plaintiffs was an unconstitutional violation of equal protection. Section 538.300 (1988, as amended).

In identical language found in both the House and Senate bills, the measure was declared an emergency act:

> Because immediate action is necessary *in order to remedy the unconstitutionality of a provision of law as it relates to post-judgment interest and its applicability to medical malpractice actions*, . . .

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[23] "[F]or a child who has been paralyzed from the neck down, the only compensation for a lifetime without play comes from non-economic damages." *Fein v. Permanente Medical Group*, 695 P.2d 665, 689-90 (Cal. 1985) (Bird, C.J., dissenting).

H.B.No. 1701; S.B. 425 (1988) (Emphasis added). There exists absolutely no distinction, constitutional or otherwise, between pre- and post-judgment interest so as to justify the allowance of one and not the other for malpractice plaintiffs. Moreover, it is impossible even to articulate a reasonable basis between the abolition of prejudgment interest on behalf of malpractice plaintiffs and any of the "presumptive" objectives leading to the passage of Chapter 538.

The statutory provision permitting malpractice defendants to satisfy a judgment of future damages in periodic or installment payments, Section 538.220, also flunks equal protection scrutiny. The clear purpose of this provision is to permit those physicians lawfully found to have negligently caused injury, or more precisely their insurance cariers, to reduce the cost of hurting people. By permitting the insurance carrier to retain the ability to pay out a future award over time the present value cost of paying the judgment is significantly reduced.[24]

In finding such payout provisions in medical malpractice statutes a denial of equal protection, other courts have observed that:

> Finally, a statute which singles out seriously injured malpractice victims whose future damages exceed $50,000.00 and requires one class to shoulder the burden inherent in a periodic payment scheme from which the general public benefits offends basic notions of fairness and justice.

Carson v. Maurer, *supra*, at 838. By all rights, the award represented by the jury's verdict becomes the property of

[24] Section 538.220(3) provides that the court "may require" a judgment debtor to post security or to purchase an annuity. In view of the risk of any casualty or surety company dissolving or going bankrupt, it makes little sense to impose this additional concern on the malpractice tort victim when all other tort victims receive the immediate right to collect a judgment in full.

the plaintiff when she obtains a judgment. Yet, by application of this arbitrary statutory scheme, the rights to that property remain with the judgment debtor. Nicole Adams is deprived of the right to use that sum of money in the manner which she chooses. She cannot accumulate interest on that property for her own benefit. This statutory provision fails even the most permissive equal protection analysis simply because it has no conceivable connection with a proper goal of providing safe and competent medical care to the citizens of the State of Missouri.

Other courts have recognized the extraordinary inequities of a program which further debases those whose lives are already devastated. In holding that the Ohio Medical Malpractice Statute was an unconstitutional violation of equal protection, the Court commented that:

> *Simply stated, the legislative scheme of shifting responsibility for loss from one of the most affluent segments of society to those who are most unable to sustain that burden, i.e., horribly injured or maimed individuals, is not only inconceivable, but shocking to this Court's conscience.*

Duren v. Suburban Community Hospital, supra, at 1362-63 (Emphasis added). Similarly, in striking down the Wyoming statute, the Supreme Court of Wyoming stressed that the legislative objectives had no conceivable relationship to the means selected:

> It cannot seriously be contended that the extension of special benefits to the medical profession and the imposition of an additional hurdle in the path of medical malpractice victims relate to the protection of the public health.

Hoem v. State of Wyoming, supra, at 789-90.

Having analyzed the discriminatory effects of the Act's classification scheme and the purported justification of the Act in view of the materials from the Statistical Sec-

tion of the Missouri Division of Insurance referenced earlier, this Court may question whether there ever existed a "medical malpractice crisis" of any proportion. In reviewing medical malpractice legislation on equal protection grounds, courts commonly take judicial notice of facts showing the existence *vel non* of any such "crisis."[25] *Lucas v. U.S.*, at 691; *Boucher v. Sayeed, supra*, at 92-93; *Young v. Alberts*, 342 N.E.2d 700, 704 (Ohio C.P. 1975); *Arneson v. Olson, supra* at 136; *Hoem v. State, supra*, at 783. The Alabama Supreme Court concluded just last month that "the correlation between the damages cap imposed by [the Act] and the reduction of health care costs to the citizens of Alabama is, at best, indirect and remote." *Moore v. Mobile Infirmary Association, supra.*[26]

The Supreme Court of Texas was highly skeptical of the relationship between statutory "caps" in medical negligence cases and insurance rates:

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[25] A number of courts which have judicially noticed the facts underlying a purported malpractice "crisis" have determined that no "crisis" ever truly existed. *Arneson v. Olson, supra* at 136 ("there did not appear to be an availability or cost crisis in this State."); *Hoem v. State, supra*, at 783 ("we note the absence of the record of any evidence demonstrating the existence of any such [malpractice] crisis in Wyoming or elsewhere."); *Crowe v. Wigglesworth*, 623 F.Supp. 699, 706 (D.Kan. 1985) ("some courts have found that the highly touted malpractice insurance crisis of 1975-76 was limited to that time period, is no longer an 'obvious' crisis, and may not now continue to be used to justify imposing separate and unequal treatment on medical malpractice litigants"); *Stephens v. Snyder*, 631 P.2d 222, 236 (Kan. 1981) (J. Herd dissenting) ("We now know the propaganda campaign mounted to obtain the legislation was overstated. The so-called crisis in availability of malpractice insurance did not exist . . ."); *Kenyon v. Hammer*, 688 P.2d 961, 975-76 (Ariz. 1984) ("There is 'authority to support the proposition' that there was no real malpractice crisis but merely hysteria engendered by a rise in premiums by insurance companies . . .").

[26] "By contrast, the burden imposed by [the Act] on the rights of individuals to receive compensation for serious injuries is direct and concrete." *Id.*

> One independent study has concluded that there is no relationship between a damage cap and increases in insurance rates [thereby reducing available health care] *given that less than .6% of all claims brought are for over $100,000.00.*

Lucas v. U.S., *supra*, at 691 (citing to *Sumner*, The Dollars and Sense of Hospital Malpractice Insurance, AFT Books 1979) (Emphasis added).

In addition to these findings by courts themselves, a number of reports and studies have determined that the alleged malpractice "crisis" had no relationship whatsoever with the function of the tort system, and was attributable entirely to market conditions and mismanagement of risk and funds by the insurance carriers themselves. Sepler, *Professional Malpractice Litigation Crises: Danger or Distortion?*, 15 Forum 493 (1980); Kindregin and Swartz, *The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Reform*, 18 St. Mary's L.J. 673 (1987); D. Luisell & H. Williams, *Medical Malpractice*, Sec. 20.07 (Supp. 1979); Aitkin, *Medical Malpractice: The Alleged 'Crisis' In Perspective*, 637 Ins. L.J. 90, 96 (1976); Oster, *Medical Malpractice Insurance*, 45 Ins. Counsel J. 228, 231 (1978); General Accounting Office, *Medical Malpractice: A Framework for Action*, 32, (1987); Crane, *Does Your Malpractice Insurer Owe You A Refund?*, Medical Economics, October 16, 1989, at 60; Nader, *The Corporate Drive to Restrict Their Victims' Rights*, 22 Gonzaga L. Rev. 15 (1986); Schroater & Rutzick, *"Tort Reform": Being an Insurance Company Means Never Having to Say You're Sorry*, 22 Gonzaga Law Review 31, (1987). The highly respected and financially independent publication, Consumer Reports, reported that "[i]nsurers are spending millions of dollars—including $6.5 million through the Insurance Information Institute—to sell the idea of a 'lawsuit crisis.'" *"The Manufactured Crisis: Liability Insurance Companies Have Created A Crisis*

and Dumped It On You," Consumer Reports, Aug. 1986, at 544.

A comprehensive study prepared by the U.S. General Accounting Office concluded that any connection between "capping" damages and the cost of health care was "remote." General Accounting Office, *Medical Malpractice: No Agreement on the Problems or Solutions*, HRD-86-50 (February 1986, at 3). The GAO Study concluded that "no consensus among the interest groups [surveyed] that any of the reforms implemented in response to the situation experienced in the mid-1970's . . . had a major effect" on the cost of malpractice insurance. *Id.* at 3. Regardless of the fact that tort reform statutes, specifically including caps on damages, had been in operation for ten (10) years in some states, the GAO concluded that "from 1983 to 1985, total medical malpractice insurance costs for physicians and hospitals rose from $2.5 billion to $4.7 billion."[27] General Accounting Office, Medical Malpractice: Insurance Costs Increased But Varies Among Physicians and Hospitals (September 1986, at 2).

The Wyoming Supreme Court found that the facts relative to an alleged medical malpractice "crisis" required at least a healthy skepticism:

> Most state courts give considerable deference to the state legislature's specific declarations and statutes that such a crisis does exist and that the substantive portions of the statute are intended to alleviate that crisis. A better approach for those courts that have yet to decide the issue would be, however, to take a more skeptical attitude toward the evidence presented by the medical profession and the insurance industry . . . *proper scrutiny of the constitutional validity of*

[27] *See also* Sloan, *State Responses to the Medical Malpractice Insurance "Crisis" of the 1970's; An Imperical Assessment*, 9 J. Health Politics, Policy & Law, 629, 630 (1985) ("To date, no one has isolated the effects of specific legislative actions on either the price or availability of malpractice insurance.")

> *state legislation demands more than a perfunctory deferral to the legislature's conclusions regarding the existence of a health care crisis in the particular state.*

Hoem v. State, supra, at 784 (citing to Comment, "*Constitutional Challenges to Medical Malpractice Review Boards*," 46 Tenn.L.Rev. 607, 645 [1978]) (Emphasis added).

On the basis of the above discussion, it is more than questionable whether a "medical malpractice insurance crisis" ever existed. The only "crisis" came about because of a profit squeeze of the insurance carriers resulting in loud cries from the doctors and hospitals because of the resultant higher premiums. Nevertheless, even assuming the existence of such a "crisis" in the full proportions painted by the medical-insurance lobbies, no basis ever exists for compromising firmly entrenched constitutional protections. The Texas Supreme Court firmly stated in this regard that:

> Even assuming that such a "crisis" has a basis in fact, it is indisputable that constitutional protections are not suspended in time of even the most legitimate crisis . . . *Constitutional protections exist for litigants regardless of market conditions for insurance companies and the medical industry*; concerns about the latter cannot be allowed to overrun the former at the expense of those who prove at trial that they were most seriously injured by acts of malpractice.

Waggoner v. Gibson, supra, at 1107 (Emphasis added) (citing to *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 589 [1952]), where the U.S. Supreme Court established that constitutional protection sexist "in good and bad times"). The true "crisis" may very well be that too many physicians and surgeons are malpracticing upon and badly injuring too many patients.[28]

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[28] *See* Harvard Study cited at note 19, *supra.* One court balanced the alleged "crisis" versus constitutional rights as follows:

The provisions of Section 538.230 permitting an apportionment of fault to released parties fail any level of Equal Protection analysis. The language of the statute effectively gives defendants the option to apportion fault to released parties. Subsection 1 provides that: "The Court, *unless otherwise agreed by all the parties*, shall instruct the jury to apportion fault among such [released] persons . . ." Section 538.230.1 (Emphasis added). It would be the rare case indeed where a defendant would choose not to have fault apportioned given the circumstances that the released party has no counsel present to defend itself.

The acute unfairness of Section 538.230 lies in the fact that it prevents plaintiffs from obtaining the full amount of the recovery for "fair and reasonable compensation" determined by the jury. This provision grossly modifies one of the most fundamental concepts of tort law that:

> Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.

Restatement (2nd) of Torts, Sec. 875 (1965). The state interest or goals which prompted enactment of Chapter 538 are not nearly substantial enough to deny the beneficient aspect of the common law of joint and several liability to malpractice plaintiffs. Under Missouri's common law and prior statutory scheme, defendants always

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> There is no doubt that the plethora of medical malpractice suits represents a crisis situation, not only to the medical profession but to their insurance carriers as well. However, in this court's opinion, there is no crisis situation, short of civil insurrection, sufficient to deprive, water down or make less valuable the right to seek redress of grievances, to a dollar amount fully compensating one for his loss, through the medium of a free and unfettered jury trial.

Simon v. St. Elizabeth Medical Center, supra, at 911-912.

have been protected from paying an amount in excess of the jury award by application of a credit or "set-off" for any prior settlements. A defendant would owe nothing where the jury's verdict was less than the amount of a prior settlement or the totality of prior settlements.

Under our present tort system, a malpractice defendant simply cannot be found at fault *unless* his or her conduct is a proximate and legally sufficient cause of the plaintiff's injuries. MAI 21.01 [1988 Revision] (Verdict Directing—Actions Against Health Care Providers—No Comparative Fault); *Schiles v. Schaefer*, 710 S.W.3d 254 (Mo.App. 1986). The concept of "relative fault" was designed and is intended solely as a means to expeditiously resolve the question of contribution among joint tortfeasors. *Missouri Pacific Railroad Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466, 473-74 (Mo.banc. 1978).

Application of Section 538.230 alone denies to Nicole Adams the bulk of the jury's verdict *notwithstanding the fact that these defendants were judged to be at fault*:

Verdict for Nicole Adams	$19,750,732.00
Less: Released persons' or entities' equitable share of the total obligation pursuant to Subsection 538.230 and disregarding the "capping" provision (60% of $19,750,732.00)	—11,850,439.00
Total Judgment for Nicole Adams	$ 7,900,293.00

The fundamental difference between these two (2) methods is that Appellant is denied the full value of compensation lawfully determined by the jury because of the Act's dismantlement of joint and several liability for malpractitioners; all other tortfeasors are subject to the common law for the well-being of the persons they harm.

Chapter 538.230 creates a benefit which flows to malpracticing health care providers and their insurers with-

out any concomitant legislative purpose and, certainly, of absolutely no benefit to malpractice victims. It is a legislative re-apportionment of the judgment back to the malpractitioner, which critically violates the "principle of fairness" upon which our common law rule of joint and several liability is based. *Missouri Pacific Railroad Co. v. Whitehead & Kales Co., supra,* at 468-69. According to the Court:

> The long history of the law of joint and concurrent tortfeasor liability and our jurisprudence is in fact a rich expositional refinement of the principle of fairness.

Id. at 468-69 n.4 (citing to J. Rawls, *A Theory of Justice* 348 [1971]) ("This premise is the basis of our fault-based system of tort liability").

Given the practical exigencies of handling these cases, it works a tremendous prejudice on malpractice victims that physicians and hospital defendants may apportion fault to released parties under Section 538.230.1. This Court recognizes that malpractice claims of any magnitude at all are rarely settled prior to the filing of a lawsuit and, once the lawsuit is filed, defense counsel and the insurance carriers invariably will not discuss settlement until plaintiffs' liability experts have been deposed.[29]

Thereafter, the basic unfairness of Section 538.230.1 emerges. The remaining defendants are permitted to use the deposition transcripts of Plaintiffs' identified expert

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[29] Indeed, that is precisely what occurred in the instant case. Following the depositions of all of Plaintiffs' anesthesiology physician experts, settlement discussions were initiated and resulted in the settlement agreement and release approved by the Court on September 27, 1990 (Legal File, p. 107.7). After all of the depositions of the surgical experts were completed, settlement talks were initiated and the surgeons and the surgical group settled with Plaintiffs, which was approved by the Court on February 1, 1991 (Legal File, 107.12.

witnesses to implicate the released physicians. As a matter of trial strategy, Plaintiff is severely hampered: her credibility is called into question if she now attacks her own expert whom she alone selected and identified. Furthermore, the released party and his or her counsel are not at trial in defense of their actions, and this results in a disproportionately high percentage finding of liability against the released party not present at trial to defend and against whom plaintiffs previously have identified expert witnesses.

Finally, the inescapable conclusion to any lay jury is that the released party has, indeed, settled with plaintiff. By carving out one isolated class of tortfeasors who may benefit from a special rule apportioning fault to released parties, the legislature is furthering no legitimate interest, other than to further line the pocketbook of wealthy health care providers and their insurance carriers.

In terms of any legislative objective to reduce the costs of malpractice litigation and encourage settlements, Section 538.230 creates precisely the opposite effect. Should this Court give constitutional credence to that section, it will virtually insure a sharp increase in both the number and complexity of malpractice actions. This comes about because a malpractice victim can obtain a judgment for one-hundred percent (100%) of her economic damages *only* by suing *and* proceeding to trial against every malpracticing party, including perhaps those the victim could have—albeit wanted to have—released.[30]

Not settling prior to or during trial would be the only way a malpractice plaintiff can assure that remaining defendants at trial would not "point the finger" at the "empty chair." It is difficult to find a legitimate legislative interest in a statutory scheme which promotes a

[30] As a practical matter, many severly injured plaintiffs, lacking money for required medical or rehabilitative services and unable to work, may be forced to settle with at least some defendants prior to trial.

greater number of malpractice trials with a greater degree of complexity and more litigation expenses and which results in fewer settlements.

Section 538.230 cannot pass Equal Protection challenge even under the "rational relationship" test because of the arbitrary and irrational scheme of discriminating against the class of tort victims brutalized by malpractice. It denies these persons the benefit of full compensation to which they would be entitled under our existing rules of joint and several liability.

4. Chapter 538 and Its Individual Provisions Violate Due Process of Law.

Section 10 of the Missouri Constitution, Article 1, Bill of Rights, provides:

> That no person shall be deprived of life, liberty or property *without due process of law.*

Missouri Constitution of 1945, Article I, Bill of Rights, Section 10 (Emphasis added). "Due process of law" in Missouri means that the individual safeguards applicable for the protection of the individual rights for one class of persons will govern precisely those rights and duties for persons which belong to that same class. *Ivie v. Bailey*, 5 S.W.2d 50, 54 (Mo. 1928). Due process requires that the law applies equally to *all* within a particular class and failing that, there is a violation of a citizen's fundamental constitutional rights. *State ex rel. Sweezer v. Green*, 232 S.W.2d 897, 903 (Mo.banc. 1950), *ovrld on other grnds, State ex rel. North v. Kirtley*, 327 S.W.2d 166 (Mo. 1959).

Due process analysis has involved the judicial requirement of a *quid pro quo* or "reasonably just substitute."[31]

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[31] The genesis of *quid pro quo* constitutional analysis is the U.S. Supreme Court decision in *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917). Therein, the Court reviewed the constitutionality of a state workers' compensation law and found that the

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978). The U.S. Supreme Court studied the Price-Anderson Act which put a $560 million ceiling on liability in nuclear power plant accidents in exchange for the imposition of strict liability and an expedited recovery scheme. *Id.* at 69. In upholding the Act under Equal Protection and Due Process grounds, the Court emphasized the significance of a substitute compensation scheme. *Id.* at 92-93. The Court also found it advantageous to plaintiffs that the Act contained a "waiver of defenses" which would effectively entitle "injured parties to compensation without proof of fault . . ." *Id.* at 91.

Applying a *quid pro quo* analysis in the context of the Due Process evaluation were the Supreme Courts of North Dakota, Texas, New Hampshire, and Illinois. Under this emerging doctrine of Due Process analysis, the Missouri medical malpractice legislation surely fails. No "reasonably just substitute" to injured malpractice victims exists to remotely compensate them for the drastic curtailment of their historical common law rights and remedies.[32]

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benefits created by the statute created a "reasonably just substitute" for the common law remedies. *Id.* at 201. In the Court's view:

> Nor is it necessary, for the purposes of the present case, to say that the State might, without violence to the constitutional guarantee of "due process of law," suddenly set aside all common-law rules respecting liability between employer and employee without providing a *reasonably just substitute* . . . It perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, *without setting up something adequate in their stead.*

Id. at 201 (Emphasis added).

[32] *Arneson v. Olson, supra* at 134-35; *Lucas v. United States, supra* at 690 ("our first concern with the statute is that the legislature has failed to provide Lucas any adequate substitute to obtain redress for his injuries"); *Carson v. Maurer, supra* at 837-38; *Wright v. Central DuPage Hospital Association, supra* at 328 ("defendants argue that there is a societal *quid pro quo* in that the loss of recovery potential to some malpractice victims is offset by 'lower insurance premiums and lower medical care costs for all recipients

The Supreme Court of Missouri used a *quid pro quo* analysis in the course of invalidating the statutory limitation period in medical malpractice cases as applied to minors. *Strahler v. St. Luke's Hospital, supra,* at 12. This Court observed that the statute "arbitrarily and unreasonably denies them a set of rights *without providing any adequate substitute course of action to follow.*" *Id.* (Emphasis added). Exactly the same reasoning applies to the case at bar in that Appellant has been deprived of a number of rights without any substitute remedy whatsoever.

By the entry of the jury's verdict of February 28, 1991, Appellants had a lawful interest in the award of compensatory damages rendered by the verdict subject to the trial and appellate court's review. It is an unconstitutional "taking" to give back to the insurance carrier of the malpracticing physician the amount of non-economic damages exceeding the "cap" which were lawfully found by the jury and approved by the trial and appellate courts. This "taking" by the statute violates due process of law as Appellants had no rights or remedy with respect thereto. *Williamson v. Vardeman,* 674

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of medical care.' This *quid pro quo* does not extend to the seriously injured medical malpractice victim . . ."). *See generally* Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties,* 18 Harv. J. Legis. 143 (1981).

Use of a *quo pro quo* analysis provided the justification for two (2) state supreme courts to uphold the constitutionality of their respective medical malpractice reform statutes. *Johnson v. St. Vincent Hospital, Inc.,* 404 N.E.2d 585, 601 (Ind. 1980); *Sibley v. Board of Supervisors of Louisiana State University,* 462 So.2d 149, 156, *opinion modified,* 477 So.2d 1094 (La. 1985). Both the Indiana and Louisiana schemes involved the creation of a Patient Compensation Fund and this was given great emphasis by each court. *Johnson v. St. Vincent Hospital, supra,* at 601 ("[t]he [Indiana] legislature responded by creating the Patient Compensation Fund); *Sibley v. Board of Supervisors fo Louisiana State University, supra,* at 156.

F.2d 1211, 1216 (W.D.Mo. 1982) (applying Missouri law).

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II. THE TRIAL COURT ERRED BY OVERRULING PLAINTIFFS' MOTION TO MODIFY JUDGMENT OR, ALTERNATIVELY, FOR NEW TRIAL BECAUSE THE JUDGMENT ENTRY OF MARCH 15, 1991 IS UNLAWFUL IN THAT THE CHALLENGED LEGISLATION VIOLATES SPECIFIC PROVISIONS OF THE UNITED STATES CONSTITUTION WHICH ARE (A) DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT, (B) EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, (C) RIGHT TO TRIAL BY JURY UNDER THE SEVENTH AMENDMENT AND (D) THE SEPARATION OF POWERS CLAUSES

Due process of law under the United States Constitution means that a person has an opportunity to be heard at a meaningful time and in a meaningful manner. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). The Fourteenth Amendment to the United States Constitution guarantees equal protection under the law and due process of law. That Amendment provides that:

> . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Bill of Rights. There is some authority that the United States Supreme Court recognizes a constitutional right of access to the courts applicable to the state through the Fourteenth Amendment. *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971). In the cited case, the State of Connecticut sought to impose court fees to indigent persons seeking a divorce. The United States Supreme Court held that such court fees unconstitutionally denied such persons the right of access to the courts and are violative of due process. *Id.*

Appellants' right to Equal Protection and right to trial by jury under the U.S. Constitution also are violated by the challenged provisions of Chapter 538, as well as the federal Separation of Powers clauses. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), Chief Justice Marshall stated that:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. *One of the first duties of government is to afford that protection.*

(Emphasis added).

* * * *

V. THE TRIAL COURT ERRED BY INSTRUCTING THE JURY IN ACCORDANCE WITH CHAPTER 538, V.A.M.S. GIVEN THE UNCONSTITUTIONALITY OF THOSE PROVISIONS UNDER THE MISSOURI AND FEDERAL CONSTITUTIONS

Plaintiffs submitted Jury Instructions to the trial court which disregarded Chapter 538, and which would have been the appropriate instructions had that medical malpractice legislation not been in effect (Legal File, pp. 112-28). The Court erred in refusing Plaintiffs' tendered instructions to the jury in this regard. *Orloff v. Fondaw*, 315 S.W.2d 430 (Mo.App. 1958). In those Jury Instructions, Plaintiffs *did not* include categorization of various damages, apportionment of fault between or among named defendants at trial, apportionment of fault between or among the named defendants at trial and any released non-parties, and did not include Verdict Directing Instructions against released parties Mestad, Powers and Binda.

To the contrary, over Plaintiffs' strenuous objections, the trial court accepted jury instructions which the Court directed Plaintiffs to prepare which were consistent with Chapter 538. These instructions, and each of them, should

have been refused because they were directly in contravention with each and every one of the provisions of the Missouri and United States Constitutions as set forth herein; defendants failed to timely supplement their pleadings to add affirmative defenses alleging fault of non-parties; and defendants failed to timely supplement their Answers to Interrogatories adding expert witnesses in support of their negligence claims against released parties Mestad, Powers and Binda. The trial court erred by instructing the jury on the fault of non-parties to the action and, notwithstanding the provisions of Chapter 538, it was error to do so.

* * * *

CONCLUSION

The majority of medical malpractice statutes across the country which have infringed upon the rights of victims of medical malpractice and have granted greater privileges to malpractice defendants have been stricken down as unconstitutional. Transcending all of the various constitutional bases for striking down these statutes are the notions of fundamental fairness and lack of equal footing. Nicole Adams and other severely injured victims like her should not be stripped of legal rights so that The Children's Mercy Hospital, Dr. Jelinek, and other malpracticing hospitals and physicians may escape full responsibility for their harmful mistakes. Our social order and common law system of civil justice must not succumb to transient whims of the majoritarian political process at the singular expense of the most tragically harmed victims.

WHEREFORE, for the above-stated reasons, Appellants Nicole and Julia Alice Adams respectfully request that the Supreme Court of Missouri enter its Order as follows:

(a) Invalidating the challenged provisions of Chapter 538, R.S.Mo., as unconstitutional under the Missouri and United States Constitutions;

(b) Remanding this action to the trial court for modification of and entry of Judgment in conformance with Missouri law; and

(c) For such other and further relief as requested herein as this Court deems just and proper.

Respectfully submitted,

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APPENDIX B

IN THE SUPREME COURT OF MISSOURI

Consolidated Case Nos.: 73867, 74139

NICOLE ADAMS, A Minor Child, By and Through Her Legal Guardian and Next Friend, JULIA ALICE ADAMS, and JULIA ALICE ADAMS, Individually,

Appellants,

v.

THE CHILDREN'S MERCY HOSPITAL, et al,

Respondents.

[Duplicate of Filing on Jun. 3, 1992]

APPELLANTS' MOTION FOR REHEARING

COMES NOW Appellants, by and through their counsel of record, pursuant to Rule 84.17 of the Missouri Rules of Civil Procedure, and respectfully move for rehearing with the Court for all the reasons set forth below:

I. THE DECISION OF THE COURT HANDED DOWN ON MAY 19, 1992 DOES NOT ADDRESS THE FEDERAL CONSTITUTIONAL ISSUES RAISED BY APPELLANTS

In setting forth the constitutional questions raised in the appeal by Nicole Adams and Julia Alice Adams, the Court sets forth only the nine (9) constitutional provisions of the Missouri Constitution. *Adams v. The Children's Mercy Hospital*, No. 73867, filed May 19, 1992, p. 4; (hereinafter "Adams Decision"). The only reference to Appellants' claim that the provisions of Chapter

538 violate the United States Constitution comes within the context of the Equal Protection Challenge (Adams Decision, p. 7), and a brief mention of the Seventh Amendment right to jury trial (p. 17). No other reference is made by the Court's decision to any of Appellants' contentions that the challenged legislation violates specific provisions of the United States Constitution expressly applicable to this Court under the provisions of the Fourteenth Amendment.

This Court has exclusive appellate jurisdiction within the State of Missouri "in all cases involving the construction of the Constitution of the United States . . ." Missouri Constitution of 1945, Art. V., 5, Sec. 3. This Court is bound to follow the provisions of the United States Constitution, especially the Fourteenth Amendment, and those decisions of the Supreme Court of the United States with respect thereto. Constitution of the United States, Art. VI; *Cooper v. Aaron*, 358 U.S. 1 (1958); *Laborers Educational and Political Club—Independent v. Danforth*, 561 S.W.2d 339, 348-49 (Mo.Banc. 1977); *Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo.Banc. 1972).

In addressing Appellants' argument that the challenged legislation violates trial by jury and due process provisions of the U.S. Constitution, Appellants respectfully urge that this Court's decision did not address these specific arguments. Appellants respectfully request clear guidance from the Court concerning these specific constitutional contentions which have been raised and argued in the briefs.

II. APPELLANTS DID RAISE THE ISSUE OF "PREJUDGMENT INTEREST" AT THE EARLIEST OPPORTUNITY IN ORDER TO PRESERVE THIS CONSTITUTIONAL CHALLENGE FOR APPELLATE REVIEW

In the Court's decision, the Court relied upon *Land Clearance For Redevelopment v. Kansas City*, 805 S.W.2d

173 (Mo.Banc. 1991), as substantial grounds for concluding that Appellants herein did not timely raise the issue of "prejudgment interest" at the trial court level. This Court specifically alluded to the reason given in *Land Clearance* for that decision because it "denied party opponents an opportunity to offer an evidentiary response . . ." (Adams's Decision, p. 19). In the case at bar, any prejudgment interest allowable would be assessed by the *trial court* and is not a subject of evidence to be considered by the *jury*. Accordingly, there was no conceivable basis by which Appellants herein could have denied respondents "an evidentiary response" in that the interest rate was not a matter to be litigated.

Furthermore, in Plaintiffs' Motion to Bar the Enforcement of Any and All Provisions of V.A.M.S., Chapter 538 filed prior to trial on February 5, 1991, Appellants herein specifically sought to bar any and *all* provisions of the challenged statute as null and void as directly violative of the Missouri and Federal Constitutions. There was no certainty that the jury's damages award would have exceeded the pre-trial settlement demand made by Appellants in accordance with Section 408.040(2), V.A.M.S. For these reasons, no conceivable prejudice could have occurred to respondents and, in addition, the all-inclusiveness of Plaintiffs' motion preserves the point.

III. THE RELIANCE OF THE COURT'S OPINION ON *DEMAY v. LIBERTY FOUNDRY CO.* AND *TULL v. UNITED STATES* MAY OVERLOOK THE CONSTITUTIONAL AND PROCEDURAL FRAMEWORK WITHIN WHICH EACH OF THESE CASES WAS DECIDED

One matter which, with all due respect, may have been overlooked by the Court's decision is an acceptance of respondents' flawed interpretation of *Demay v. Liberty Foundry Co.*, 37 S.W.2d 640 (Mo. 1931) and the U.S. Supreme Court decision in *Tull v. United States*, 481

U.S. 412 (1987). The interpretation given to each of these decisions by respondents, which lifts each holding out of the proper constitutional context, may have inadvertently been utilized in this Court's decision.

The Missouri Supreme Court decided *DeMay v. Liberty Foundry Co., supra*, in the context of holding Missouri's Workers' Compensation scheme constitutional. *Id.* at 644-45. The statutory scheme replaced one system with rights and remedies while streamlining proof of fault and eliminating certain common law defenses. *Id.*

In holding the new statutory scheme constitutional, this Court repeatedly stressed that the Act was a *voluntary* and elective measure in that either an employer or employee may decide not to be bound by the provisions of the Act. *Id.* at 649. As pointed out by this Court:

> Either party to the contract of hiring may preserve his *right to trial by jury* by electing to stand upon the provisions of Section 1 of the Act.

Id. at 649 (Emphasis added). No such election is available to horribly injured victims of a physician's or hospital's malpractice. For this reason, Appellants herein respectfully urge this Court to reconsider the precedential value of *DeMay* in view of the above discussion.

Similarly, respondents and this Court's opinion relied upon the United States Supreme Court decision of *Tull v. United States, supra*, for the proposition that a citizen has no constitutional right to a jury's determination of damages. The United States Supreme Court itself distinguished *Tull* from the circumstances of the case at bar by pointing out the civil penalty at issue was more analogous to the type of 18th Century English action which did *not* require trial by jury. *Id.* at 420-21. Furthermore, the Court held that the civil penalty at issue "was the type of remedy at common law that could only be enforced in courts of law." *Id.* at 422. Thus, the precedential

value of *Tull v. United States*, *supra*, to the circumstances of the case at bar is nil.

The U.S. Supreme Court placed great emphasis upon the fact that the *party* bringing the action is the U.S. government, not a private citizen. *Tull* has no bearing on the right to trial by jury as between private civil litigants. *Id.* at 427 (holding limited to requirement of jury for *civil penalty* only). Indeed, the U.S. Supreme Court recently affirmed in the context of a civil trial that the assessment of the *amount* of punitive damages is uniquely, historically, and constitutionality a province of the jury. *Pacific Mutual Life Insurance Company v. Haslip*, 111 S.Ct. 1032 (1991).

IV. CONCLUSION

Appellants respectfully urge this Court to grant a rehearing for the reasons stated herein. Significant and material matters of law and fact, by a reading of the Court's opinion, do require re-examination and review. The importance of this issue not only to Appellants herein but to future generations of innocent victims of egregious medical malpractice requires nothing less.

WHEREFORE, for the above-stated reasons, Appellants herein respectfully request that this Court enter its Order sustaining this Motion for Rehearing for the reasons set forth herein and to grant such other and further relief as this Missouri Supreme Court deems just and proper and according to law.

Respectfully submitted,

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APPENDIX C

IN THE SUPREME COURT OF MISSOURI

Consolidated Case Nos. 73867, 74139

NICOLE ADAMS, a minor child, by and through her legal guardian next friend JULIA ALICE ADAMS, and JULIA ALICE ADAMS, individual,

Appellants,

v.

CHILDREN'S MERCY HOSPITAL, *et al.*,

Respondents.

RESPONDENT CHILDREN'S MERCY HOSPITAL'S SUGGESTIONS IN OPPOSITION TO APPELLANTS' MOTION FOR REHEARING

COMES NOW, Respondent the Children's Mercy Hospital, by and through its counsel of record, pursuant to Rule 84.17 of the Missouri Rules of Civil Procedure, and respectfully offers the following suggestions in opposition to Appellants' motion for rehearing by this Court:

I. THIS COURT'S MAY 19, 1992, DECISION ANSWERS THE FEDERAL CONSTITUTIONAL ISSUES RAISED BY THE APPELLANTS.

Appellants argue that this Court made no reference in its May 19 opinion in this case to appellants' claim that the provisions of Chapter 538 violate the trial by jury and due process provisions of the United States Constitution.

The appellants' argument fails for several reasons: First, the rationale this Court used in finding that Chapter 538 does not violate the trial by jury or due process

provisions of the Missouri Constitution is the same analysis that applies to the United States Constitution. Therefore, the decision necessarily means that the federal Constitution has not been violated.

Secondly, the provisions of the Missouri Constitution have consistently been interpreted more narrowly than the corresponding provisions in the United States Constitution. All but one of the federal courts that have considered the issue of the constitutionality of similar legislation have found such legislation to be constitutional under the United States Constitution. *See Franklin v. Mazda Motor Corp.*, F. Supp. 1325 (D. Md. 1989); 704 *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); and *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989).

Furthermore, as this Court noted in its opinion, there is no substantive right under the common law to a jury determination of damages under the Seventh Amendment. The assessment of a civil penalty is not one of the 'fundamental elements' preserved by the common law right to a jury trial." *Adams v. The Children's Mercy Hospital*, Slip op. 738767 at pg. 17. This statement clearly recognizes that the Seventh Amendment is not violated by Chapter 538. Consequently, appellants' point as to the trial by jury right is especially misplaced.

Finally, respondent respectfully suggests that, should this Court find any merit to appellants' argument, this Court could rectify any misconceptions by a simple addition to the opinion. Rehearing is not required or justified by the facts before this Court.

II. APPELLANTS' ATTEMPT TO REARGUE ISSUES IS IMPROPER AND SHOULD BE IGNORED.

A. Appellants Did Not Raise The Issue Of "Prejudgment Interest" At The Earliest Opportunity.

Respondent's brief clearly raised and fully presented the appellants' untimely raising of several constitutional issues. (Respondent Children's Mercy Hospital Brief at 11-13). Appellants then had the opportunity to reply to those issues in their response brief. They further had the opportunity to present argument to this Court about this issue. Indeed, appellants availed themselves fully of the opportunity to discuss the issue of their untimely raising of certain constitutional complaints in their Reply Brief. (Appellants' Reply Brief at 21-25).

Rule 84.17 provides that the purpose of a motion for rehearing is to "call attention to material matters of law or fact overlooked or misinterpreted by the Court as shown by its opinion. *Reargument of issues determined by the opinion will be disregarded.*" (emphasis added). *See also Paskon v. Salem Memorial Hospital*, 806 S.W.2d 417 (Mo. Ct. App. 1991). Appellants are now attempting to reargue an issue that was clearly determined by this Court. Appellants' reargument should be disregarded.

B. This Courts' Opinion Does Not Overlook Any Constitutional Or Procedural Issues.

Appellants argue that this Court's decision is based on a flawed interpretation of *DeMay v. Liberty Foundry Company*, 37 S.W.2d 640 (Mo. 1931) and *Tull v. United States*, 418 U.S. 412 (1987). Again, the appellants are merely rearguing issues that they have already presented to this Court. Appellants' contention that the *Demay* case is not applicable because it addressed the statutory workmens' compensation scheme as a voluntary measure was argued in the Appellants Reply Brief filed with this

Court on December 27, 1991. (Appellants' Reply Brief at 12-14).

Appellants also briefed this Court on any "misperception" about the *Tull* case in their Response Brief. (Appellants' Reply Brief at 17-18). Appellants' attempted reargument should be ignored by this Court and this Court's well-reasoned decision in this case should stand as filed.

CONCLUSION

Respondent respectfully suggests that this Court's original opinion in this case is proper and that no sound basis for granting Appellants' request for rehearing exists.

WHEREFORE, for all the foregoing reasons, Respondent Children's Mercy Hospital respectfully suggests that this Court enter its Order overruling Appellants' Motion for Rehearing.

Respectfully submitted,

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APPENDIX D

IN THE SUPREME COURT OF MISSOURI

Case Nos. 73867 & 74139

NICOLE ADAMS, A Minor Child, By and Through
Her Legal Guardian and Next Friend,
JULIA ALICE ADAMS, and
JULIA ALICE ADAMS, Individually,
Appellant,

v.

JANE JELINEK-BOOZALIS,
Cross-Appellant,

v.

THE CHILDREN'S MERCY HOSPITAL,
Respondents.

Appeal from the Circuit Court of Jackson County,
Missouri, Sixteenth Judicial Circuit, Division No. 6
Honorable John R. O'Malley, Judge and Consolidation
with Transfer from the Missouri Court of Appeals
for the Western District, W.D. No. 44857

RESPONDENT CHILDREN'S MERCY HOSPITAL
BRIEF

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* * * *

The United States Supreme Court has held that there is no vested interest in any rule at common law.

> The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," despite the fact that "otherwise settled expectations" may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Duke Power Company v. Envtl. Study Grp., Inc., 57 L. Ed. 2d 595 (1978); *Tull v. United States*, 95 L. Ed. 2d 365 (1987).

* * * *

This Court has identified suspect classifications as "those based on race, religion or similar considerations." *Harrell* at 63, citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, (1976), wherein the Supreme Court said: "a suspect class is 'one saddled with such disabilities, or subject to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Massachusetts Board* at 313.

Fundamental rights in Missouri include the right to free speech, to vote, to travel interstate, and to personal privacy. *Mahoney* at 512.

The equal protection guarantee is directed at "invidious discrimination." When neither a fundamental right is infringed nor suspect class created, the equal protection safeguard is only offended when a classification rests on grounds "wholly irrelevant to the achievement of the state's objective." *Id.* Indeed the state is not required to prove the "correctness" of a legislative decision. The state legislature is presumed to have acted within the constitutional confines even if, "in practice, their laws result in some unequality." *Id., citing McGowan v. Maryland*, 366 U.S. 420, 425 (1961), and *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 464.

* * * *

B. A Reasonable Basis for the Missouri Legislature's Enactment of Chapter 538 Existed in 1986 and Still Exists Today.

The first principle of any equal protection inquiry is that a "duly enacted statute is presumed to be constitutional." *Mahoney* at 512. While parties asserting an equal protection challenge may introduce evidence supporting their claim that the legislative enactment is irrational, they *cannot* prevail if "it is evident . . . *that the question is at least debatable.*" *United States v. Caroline Products Co.*, 304 U.S. 144, 154 (1938); *Mahoney* at 513.

Missouri is not required to convince this Court of the correctness of its legislative judgment in enacting Chapter 538. Rather, the burden is on the plaintiffs to convince this Court that the legislative facts upon which Chapter 538's classification was "apparently based *could not reasonably be conceived to be true by the governmental decisionmaker.*" *Mahoney* at 512, citing *Minnesota Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 66 L. Ed.2d 659 (1981); *Vance v. Bradley*, 440 U.S. 93, 111, 59 L.

Ed.2d 171, 184-85 (1979) (Emphasis added). Plaintiffs have not met this heavy burden.

* * * *

The United States Supreme Court has found that a statutory limitation on recovery "is a classic example of an economic regulation—a legislative effort to structure and accommodate the burdens and benefits of economic life.'" *Duke Power Company v. Environmental Study Group, Inc.*, 57 L.Ed.2d 595 (1978).

* * * *

Furthermore, United States Supreme Court guidance in determining "quasi-fundamental rights" or "semi-suspect" classes shows that "the right to recover for personal injuries" is not an appropriate class for heightened scrutiny. The United States Supreme Court has only applied heightened scrutiny in cases of illegitimacy, *Clark v. Jeter*, 108 S. Ct. 1910 (1988); gender, *Craig v. Boren*, 429 U.S. 190 (1976) and alienage, *Plyles v. Doe*, 457 U.S. 202 (1982). In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1977) the United States Supreme Court used the rational basis test in analyzing and upholding a federal law limiting the damages recoverable from a nuclear plant operation in the event of a nuclear accident. *Duke Power* at 93.

* * * *

XI. THE TRIAL COURT DID NOT ERR WHEREIN IT OVERRULED PLAINTIFFS' MOTION TO MODIFY JUDGMENT, OR ALTERNATIVELY, FOR NEW TRIAL BECAUSE CHAPTER 538 DOES NOT VIOLATE ANY OF THE PROVISIONS OF THE MISSOURI OR UNITED STATES CONSTITUTIONS IN THAT CHAPTER 538 WITHSTANDS CHALLENGES ON DUE PROCESS, EQUAL PROTECTION, RIGHT TO TRIAL BY JURY AND SEPARATION OF POWERS GROUNDS.

Defendant has previously discussed in detail why Chapter 538 does not offend any aspect of the Missouri Constitution. Plaintiffs' assertion that Chapter 538 violates the United States Constitution is equally without merit. A cursory reading of plaintiffs' second point relied on reveals that plaintiffs could not find even one federal case to support their claim.

As previously discussed, all of the federal courts that have considered the constitutionality of reform acts have upheld such acts as constitutional. *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989); *Davis v. Omitowoju*, 883 F.2d 1155 (3rd Cir. 1989); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986). In fact, the *Boyd* court upheld a *total* recovery cap which was much more onerous than Missouri's noneconomic cap.

Under the analysis of those cases and the foregoing points of this brief, Chapter 538 does not violate any provision of the United States Constitution.

APPENDIX E

IN THE SUPREME COURT OF MISSOURI

No. 73867

NICOLE ADAMS, a Minor Child, by and through her Legal Guardian and Next Friend, Julie Alice Adams, and JULIA ALICE ADAMS, Individually,
Appellants/Plaintiffs

vs.

THE CHILDREN'S MERCY HOSPITAL,
Respondent
and

JANE JELINEK, M.D.,
Respondent/Cross-Appellant

Appeal from the Circuit Court of Jackson County
HONORABLE JOHN R. O'MALLEY, Judge
Division No. 6

RESPONDENT/CROSS-APPELLANT
JANE JELINEK, M.D.'s RESPONDENT: BRIEF

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* * * *

XII. CHAPTER 538 DOES NOT VIOLATE THE DUE PROCESS, EQUAL PROTECTION, RIGHT TO TRIAL BY JURY AND SEPARATION OF POWERS CLAUSES OF THE UNITED STATES CONSTITUTION.

This defendant has demonstrated, in arguments set forth above, that Chapter 538 does not violate the due process, equal protection, right to trial by jury and separation of powers clauses of the Missouri Constitution. Much, if not all, of those arguments are equally applicable to plaintiffs' constitutional challenges under the United States Constitution. For the reasons set forth above, plaintiffs' challenges under the United States Constitution are without merit.

It should be noted that the plaintiffs fail to cite a single federal court case in support of their constitutional challenge under the United States Constitution. The plaintiffs cite *Bodie v. Connecticut*, 401 U.S. 371 (1971). However, this defendant has previously discussed this case and subsequent decisions, which actually support the upholding of Chapter 538 in the face of constitutional challenge. *See, supra*, pp. 27-30. In fact, federal courts have routinely upheld legislation similar to Chapter 538 in the face of constitutional attacks. *Franklin v. Mazda Motor Corp.*, 705 F. Supp. 1325 (D. Md. 1989); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Davis v. Omitowogau*, 883 F.2d 1155 (3rd Cir. 1989). Pursuant to the reasoning set forth in these federal cases and the arguments set forth above in response to plaintiffs' constitutional challenges under the Missouri Constitution, it is clear that Chaper 538 does not violate any provision of the United States Constitution.

* * * *

APPENDIX F

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

Case No. CV89-23626
Division 6
Civil Docket "M"

NICOLE ADAMS, A Minor Child, By and Through Her Legal Guardian and Next Friend, JULIA ALICE ADAMS, and JULIA ALICE ADAMS, Individually,

Plaintiffs,

v.

THE CHILDREN'S MERCY HOSPITAL, *et al.*,

Defendants.

SUGGESTIONS OF DEFENDANTS CHILDREN'S MERCY HOSPITAL, CINDY DOOLEY, R.N. AND SUSAN ROUSHAR, R.N. IN OPPOSITION TO PLAINTIFFS' MOTION TO BAR ENFORCEMENT OF CHAPTER 538, V.A.M.S.

COME NOW defendants, the Children's Mercy Hospital, Susan Roushar, R.N. and Cindy Dooley, R.N., by and through their attorneys, and offer the following suggestions in opposition to plaintiffs' motion to bar enforcement of Chapter 538, V.A.M.S.:

I. *FACTUAL BACKGROUND*

Plaintiffs' medical malpractice cause of action is set for trial in this court on February 11, 1991. This cause of action arose as a result of incidents occurring on March

30, 1988. Plaintiffs' medical malpractice action alleges improper health care. Therefore it is subject to Chapter 538, V.A.M.S., which applies to all such claims accruing on or after February 3, 1986.

On February 6, defendant received plaintiffs' motion to bar the enforcement of Chapter 538 at the trial. Defendants respectfully request that this Court enforce Chapter 538 in its entirety because it is constitutional under both the Missouri and United States Constitutions. Furthermore, plaintiffs' claim is not justiciable at this time because it is not ripe.

* * * *

The United States Supreme Court has said:

> Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," despite the fact that "otherwise settled expectations" may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Duke Power Company v. Envtl. Study Grp., Inc., 57 L. Ed.2d 595 (1978); *Tull v. United States*, 95 L. Ed.2d 365 (1987).

* * * *

Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989), upheld the constitutionality of a statutory cap in medical malpractice actions despite plaintiffs' assertion of both state and federal constitutional issues. The federal court found the state issues to be controlled by *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525 (Va. 1989), which upheld the constitutionality of the cap on all grounds.

In considering the validity of the cap under the federal Constitution the court held that it was not the jury's role to determine the legal consequences of its factual

findings. The court found that "once the jury has made its findings of fact with respect to damages, it has fulfilled its constitutional function; *it may not also mandate compensation as a mater of law.*" *Id.* at 1196 (emphasis added). It also noted that the United States Supreme Court had recently suggested that the right to a jury trial might not even extend to the "remedy phase of a civil trial." *Tull v. United States*, 95 L. Ed.2d 365 (1987).

* * * *

The United States Supreme Court has found that a statutory limitation on recovery "is a classic example of an economic regulation—a legislative effort to structure and accommodate 'the burdens and benefits of economic life.'" *Duke Power Company v. Environmental Study Group, Inc.*, 57 L. Ed.2d 595 (1978).

* * * *

VI. *SUMMARY*

Within the entire body of plaintiffs' motion, not one case can be found to support the numerous constitutional attacks which plaintiffs assert. The few cases plaintiffs do cite are either overruled or distinguishable. On the other hand, defendant has cited this Court to numerous state and federal cases specifically addressing the challenges which plaintiff has lodged. Chapter 538 does not violate plaintiff's right of access to the courts, right to a jury trial, right to equal protection or to due process of law. In addition, plaintiffs' claims are not ripe.

WHEREFORE, for the above stated reasons, defendants Children's Mercy Hospital, Susan Roushar, R.N. and Cindy Dooley, R.N., respectfully request this Court to overrule plaintiffs' motion.

Respectfully submitted,

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